IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

TERANCE BIGGERS, JR,	:	
	:	
Plaintiff,	:	
	:	
VS.	:	**Civil No. 5:16-cv-00532-MTT-CHW**
	:	
Sheriff DAVID DAVIS, et al,	:	
	:	
Defendants.	:	

ORDER & RECOMMENDATION

This case is currently before the United States Magistrate Judge for a preliminary screening as required by the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915A. Plaintiff Terrance Biggers initiated this action by filing a *pro se* complaint seeking relief under 42 U.S.C. § 1983 for violations of his constitutional rights occurring at the Bibb County Law Enforcement Center in Macon, Georgia. At the time of filing, Plaintiff moved for leave to proceed without prepayment of the filing fee and requested that counsel be appointed to assist him in prosecuting his claims.

I. Motion to Proceed *In Forma Pauperis*

Any court of the United States may authorize the commencement a civil action, without prepayment of the required filing (*in forma pauperis*), if the plaintiff shows that he is indigent and financially unable to pay the court's filing fee. *See* 28 U.S.C. § 1915(a). A prisoner wishing to proceed under § 1915 must provide the district court with both (1) an

affidavit in support of his claim of indigence and (2) a certified copy of his prison "trust fund account statement (or institutional equivalent) for the 6-month period immediately preceding the filing of the complaint." § 1915(b).

Pursuant to this provision, Plaintiff requests leave to proceed in this case without prepayment of the $350.00 filing fee. After a review of his submissions, the undersigned finds that Plaintiff's pauper's affidavit and trust account statement do in fact show that he is unable to pre-pay the entire amount of the Court's $350.00 filing fee at this time. Plaintiff's motion to proceed *in forma pauperis* (ECF No. 2) is thus GRANTED. Plaintiff is, however, still obligated to eventually pay the full balance of the filing fee, in installments, as set forth in § 1915(b) and explained below. The district court's filing fee is not refundable, regardless of the outcome of the case, and must therefore be paid in full even if the plaintiff's complaint (or any part thereof) is dismissed prior to service.

The CLERK shall forward a copy of this Order to the business manager of the facility in which Plaintiff is incarcerated so that withdrawals from his trust fund account may commence as payment towards the filing fee.

A. Directions to Plaintiff's Custodian

Because Plaintiff has now been granted leave to proceed *in forma paupers* in the above-captioned case, it is hereby ORDERED the warden of the institution wherein Plaintiff is incarcerated, or the Sheriff of any county wherein he is held in custody, and any successor custodians, each month cause to be remitted to the CLERK of this Court twenty percent (20%) of the preceding month's income credited to Plaintiff's account at said

institution until the $350.00 filing fee has been paid in full. In accordance with provisions of the PLRA, Plaintiff's custodian is now authorized and DIRECTED to forward payments from the prisoner's account to the CLERK OF COURT each month until the filing fee is paid in full, provided the amount in the prisoner's account exceeds $10.00. It is further ORDERED that collection of monthly payments from Plaintiff's trust fund account continue until the entire fee has been collected, notwithstanding the dismissal of Plaintiff's lawsuit or the granting of judgment against him prior to the collection of the full filing fee.

B. Plaintiff's Obligations Upon Release

In the event Plaintiff is hereafter released from the custody of the State of Georgia or any county thereof, he remains obligated to continue making monthly payments to the CLERK toward the balance due until said amount has been paid in full. Collection from Plaintiff of any balance due on the filing fee by any means permitted by law is hereby authorized in the event Plaintiff is released from custody and fails to remit payments. Plaintiff's complaint may be dismissed if he is able to make payments but fails to do so.

II. Motion for Appointment of Counsel

Before addressing the merits of Plaintiff's claims, the Court will also, in an abundance of caution,[1] consider Plaintiff's request for counsel. *See* Compl. at 9. The district court is vested with the discretion, by 28 U.S.C. § 1915, to appoint counsel in a civil

1 Requests for counsel should be made by separate motion and may not be included as part of the complaint or within any other pleading. *See* Fed. R. Civ. P. 7 (requiring that a request for court order be made by motion and that the motion be in writing, "state in particularity the grounds for seeking the order," and "state the relief sought").

case for a plaintiff unable to afford an attorney. Civil litigants (including prisoners pursuing a § 1983 action), however, have no absolute constitutional right to the appointment of counsel. *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987). The appointment of counsel in a civil case is "a privilege that is justified only by exceptional circumstances, such as where the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner." *Id.* "The key is whether the *pro se* litigant needs help in presenting the essential merits of his or her position to the court. Where the facts and issues are simple, he or she usually will not need such help." *Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir.1993).

In this case, Plaintiff has filed a § 1983 complaint on the standard complaint form designed for *pro se* litigants. The PLRA requires that the Court now review Plaintiff's complaint form to determine whether he can possibly state a viable claim against the named defendants. This process is routine in *pro se* prisoner actions and not an "exceptional circumstance" justifying the appointment of counsel. The facts and legal issues involved in this case are fairly straightforward; and the court has not imposed any procedural requirements which would limit Plaintiff's ability to present his case to the court. *See Kilgo*, 983 F.2d 193-94. Therefore, as the undersigned sees no immediate need for the appointment of counsel in this case, Plaintiff's request is **DENIED**.

III. Authority & Standard for Preliminary Review

The undersigned will now turn to Plaintiff's complaint. The Prison Litigation Reform Act requires every complaint filed by either (1) a prisoner seeking redress from a

government entity, official, or employee, or (2) a person who is proceeding before the court *in forma pauperis*, be screened by the district court for frivolity prior to service. *See* 28 U.S.C. § 1915A(a) (requiring the screening of prisoner cases) & 28 U.S.C. § 1915(e) (regarding *in forma pauperis* proceedings). When performing this review, the district court must accept all factual allegations in the complaint as true. *Brown v. Johnson*, 387 F.3d 1344, 1347 (11th Cir. 2004). *Pro se* pleadings are also "held to a less stringent standard than pleadings drafted by attorneys," and thus the plaintiff's claims are "liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). *See also*

The district court, however, cannot allow a *pro se* plaintiff to litigate frivolous, conclusory, or speculative claims. The court is instead obligated to dismiss a *pro se* complaint, or any part thereof, prior to service, if it is apparent on the face of the complaint that the plaintiff's allegations, when taken as true, fail to state a claim upon which relief may be granted – i.e., that the plaintiff is not entitled to relief based on the facts alleged. *See* § 1915A(b)(1); § 1915(e). To state a viable claim, the complaint must include "enough factual matter" to – not only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" – but to also create "a reasonable expectation" that discovery will reveal evidence to prove the claim(s). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). The plaintiff's claims cannot be speculative or based solely on suspicions; they must be supported by fact. *Id*. Thus, neither legal conclusions nor a recitation of legally relevant terms – unsupported by allegations of discoverable facts specific to the case – is sufficient to state a viable claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)

(legal "labels and conclusions" or "a formulaic recitation of the elements" of a cause of action is not enough to state a claim).

With these standards in mind, the Court will consider each of Plaintiff's claims.

IV. Plaintiff's Complaint

The claims in the present case arise from Plaintiff's pretrial confinement at the Bibb County Law Enforcement Center ("Bibb County LEC"). According to the complaint, Plaintiff was arrested on September 1, 2016, for armed robbery and high-jacking a motor vehicle. Plaintiff asserts, however, that these charges are void and thus his related confinement is unlawful because, on August 8, 2016, he had already pleaded guilty to the "mutually exclusive" offense of theft by receiving a stolen vehicle (i.e, the same vehicle he is now accused of hijacking) and was sentenced five years of probation and time served.

Plaintiff also claims that the conditions of confinement at the Bibb County LEC are inhumane. Plaintiff has apparently lodged complaints (verbally and/or in writing) with both supervisory prison officials and the officers who work in his cell-block. No one, however, has taken action to remedy either his wrongful confinement or the conditions thereof. Plaintiff has instead been told to stop complaining and was once moved to a "high-max security" block by Officer Williams in retaliation for filing a grievance.

Plaintiff has now filed this action under § 1983, and after review his allegations, the undersigned liberally construes his complaint as bringing (1) Fourth Amendment claims of false imprisonment against Defendants Sheriff Davis, Captain Boatwright, and the Bibb LEC; (2) Eighth Amendment claims for cruel and unusual punishment against Plaintiff's

Eighth Amendment claims against Defendants Williams, Brooks, Billingsley, Wooten, Phillips, Saidi, Crawford, Robinson, Lawrence, Haughabrook, and "Trinity" Food Services; and (3) First Amendment claims of retaliation against Defendants Williams and Robinson. *See* Compl., ECF No. 1, at 8-11. Plaintiff prays for an award or more than of $3,000,000 in damages as to each claim and also seeks injunctive relief requiring improvement of his living conditions. *Id.* at 11.

A. False Imprisonment Claims

Plaintiff's first claim, and cursory assertion, that his present confinement is unlawful fails to support a claim under §1983. Habeas corpus "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release." *Id.* at 481. A prisoner is thus barred from bringing a civil action against the individuals responsible for his incarceration if "success in that action would necessarily demonstrate the invalidity of [his] confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005). *See also Edwards v. Balisok*, 520 U.S. 641 (1997); *Wiley v. City of Chicago,* 361 F.3d 994, 996 (7th Cir. 2004) (applying *Heck* doctrine to claims brought by pretrial detainee). Because Plaintiff complains of pending charges, he is also advised that this Court lacks authority to intervene in an active prosecution in state court so long as the plaintiff has an adequate remedy at law and will not suffer irreparable injury. *Younger v. Harris,* 401 U.S. 37, 43 (1971). *See Doby v. Strength*, 758 F.2d 1405, 1406 (11th Cir. 1985). Plaintiff has remedies available to him in the state courts with respect to the claims brought and has not alleged any risk of irreparable injury.

Plaintiff, accordingly, cannot state a viable claim of false imprisonment against "Sheriff David Davis," "Captain Billy Boatwright," and the "jailers and officers" at the Bibb County LEC. If Plaintiff wishes to challenge the fact of his confinement, he may do so only by filing a petition for writ of habeas corpus - after he has fully exhausted his state remedies. *See e.g.* O.C.G.A. § 9-14-1(a) (allowing for writ of habeas corpus to be filed in state court to challenge the legality of pretrial restraints on freedom).

B. Cruel and Unusual Punishment

In his next claim, Plaintiff complains about the conditions of his confinement. The living conditions of a prisoner's confinement may constitute cruel and unusual punishment under the Eighth Amendment if they involve or result in "wanton and unnecessary infliction of pain, [or] ... [are] grossly disproportionate to the severity of the crime warranting imprisonment." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). A violation may occur as the result of either a single condition or a combination of conditions. *Id.* at 347. To be actionable, however, the condition(s) must be objectively and sufficiently "serious," or "extreme," so as to constitute a denial of the "minimal civilized measure of life's necessities." *Thomas v. Bryant*, 614 F.3d 1288, 1304 (11th Cir. 2010). This standard is only met when the challenged conditions pose either (1) "an unreasonable risk of serious damage to [the prisoner's] future health or safety," *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004), or (2) if society "considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling v. McKinney*, 509 U.S. 25, 37 (1993).

Here, Plaintiff alleges that Defendants have violated (or are currently violating) his rights under the Eighth Amendment by failing to provide him with a mattress, adequate lighting, ventilation, sanitation, hot water, basic hygiene, outdoor recreation, and adequate nutrition. The officers assigned to Plaintiff's cell block – Defendants Williams, Brooks, Billingsley, Wooten, Phillips, Saidi, Crawford, Robinson, and Lawrence – are aware of these conditions but have responded with indifference to his complaints, saying "nothing will change, it has been like this for years." Plaintiff also complained to the officer supervising sanitation, Corporal Lawrence, but received no response to his requests for cleaning materials and lighting; and when Plaintiff approached Officer Saidi about the known living conditions, Saidi ordered him to just "stop complaining."

1. Claims against Officers

Upon review of the relevant law, it appears that federal courts have found that, under some circumstances, living conditions that lack adequate ventilation, sufficient lighting, protections against potentially harmful molds, and adequate nutrition may rise to the level of cruel and usual punishment. *See e.g., Laube v. Haley*, 234 F. Supp. 2d 1227, 1242 (M.D. Ala. 2002) ("inadequate ventilation can amount to an Eighth Amendment violation.") (citing *Ramos v. Lamm,* 639 F.2d 559, 569 (10th Cir. 1980) ("Inadequate ventilation ... results in excessive odors, heat, and humidity with the effect of creating stagnant air as well as excessive mold and fungus growth …. with health and sanitation problems"), *cert. denied,* 450 U.S. 1041 (1981); *Adams v. Mathis*, 458 F. Supp. 302, 308 (M.D. Ala. 1978), aff'd, 614 F.2d 42 (5th Cir. 1980) ("The failure to properly prepare and

serve nutritionally adequate food to inmates … constitutes a violation of the inmates' Eighth and Fourteenth Amendment rights."); *Young v. Quinlan*, 960 F.2d 351, 365 (3d Cir. 1992) (denial of "basic sanitation ... is 'cruel and unusual). Thus, at this early stage of the proceedings, the Court is unable to find that Plaintiff's complaints about his living conditions are legally frivolous. The undersigned will thus allow Plaintiff's Eighth Amendment claims against Defendants Williams, Brooks, Billingsley, Wooten, Phillips, Saidi, Crawford, Robinson, and Lawrence to go forward.

2. Claims against Trinity Food Services and Alfred Haugabrook

Plaintiff's allegations are, however, not enough to state a claim against Trinity Food Services or its food service manager, Mr. Haugabrook, as Plaintiff fails to make sufficient factual allegations against these defendants in his complaint. As a rule, supervisory officials who were not personally involved in unconstitutional conduct, and whose only roles involved a failure to act in response to a statement or complaint mailed by a prisoner, are not liable on the theory that his failure to act constituted acquiescence in the unconstitutional conduct. *Grinter v. Knight*, 532 F.3d 567 (6th Cir.2008). In other words, the mere failure by a supervisory official to "respond to an inmate's letters does not [standing alone] result in a violation of that inmate's constitutional rights." *Ware v. Owens*, No. CV612–056, 2012 WL 5385208, at * 2 (S.D. Ga. Sept. 28, 2012). *See also Greenwaldt v. Coughlin*, 1995 WL 232736, *4 (S.D.N.Y. April 19, 1995) ("[I]t is well-established that an allegation that an official ignored a prisoner's letter of protest and request for an investigation is insufficient to hold that official liable for the alleged violations"). In the

same way, a contractor who operates a prison service cannot be sued directly under § 1983 absent evidence that the alleged constitutional deprivation occurred as a direct result of the contractor's official policies or customs. *See e.g.*, *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir.1997) (holding that when a private corporation contracts with the county to provide services to inmates, the entity should be treated as a municipality). Plaintiff does not include any such allegations against these defendants in his complaint.

C. Retaliation

Though not identified in a separate count of the Complaint, Plaintiff does appear to allege a claim of retaliation. A prisoner is "considered to be exercising his First Amendment right of freedom of speech when he complains to the prison's administrators about the conditions of his confinement." *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008); *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003). A prisoner may thus state a First Amendment retaliation claim by alleging that he suffered an adverse consequence because he complained about the conditions of his confinement. *See id*.

Here, according to the Complaint, Officer Williams moved Plaintiff to a "high-max security block" because Plaintiff filed a grievance "about the holes in the ceilings and green mold in the showers." Plaintiff also alleges that Corporal Robinson similarly threatened to move to a more "dangerous block" if he continued complaining about the conditions of his confinement. Based on these allegations, the undersigned will also allow claims of retaliation against Williams and Robinson to go forward.[2]

2 Although Plaintiff's complaint does not expressly refer to retaliation claim, the Court is required

V. Recommendations of the United States Magistrate Judge

For those reasons stated herein, it is hereby RECOMMENDED Plaintiff's false imprisonment claims against Sheriff Davis, Captain Billy Boatwright, the "jailers and officers" at the Bibb County LEC be DISMISSED as frivolous. It is also RECOMMENDED that Plaintiff's Eighth Amendment claims against Defendants Trinity Food Services and Alfred Haugabrook be DISMISSED with leave to amend. Any amendment of these claims must be filed within FOURTEEN (14) DAYS of this Order. If not amended the CLERK shall automatically DISMISS Plaintiff's claims against Trinity Food Services and Alfred Haugabrook WITH PREJUDICE.

VI. Right to File Objections

Pursuant to 28 U.S.C. § 636(b)(1), the parties may also serve and file written objections to any recommendation with the United States District Judge to whom this case is assigned within FOURTEEN (14) DAYS after being served with a copy of this Recommendation. The parties may seek an extension of time in which to file written objections, provided a request for an extension is filed prior to the deadline for filing written objections. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. *See* 11th Cir. R. 3-1.

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to consider potentially mislabeled claims if the facts to state a cognizable claim "are clearly present in a *pro se* complaint." *Ford v. Hunter*, 534 F. App'x 821, 825 (11th Cir. 2013). *See also O'Berry v. State Attny's Office*, 241 F. App'x 654, 657 (11th Cir. 2007) (stating that the district court is "obligated, as part of its screening protocol, to seek out and identify any and all cognizable claims of the plaintiff"). If Plaintiff does not wish to proceed with any retaliation claims, he need only advise the Court of this in his response and/or objection to this Order, *see* Section V., *infra*.

VII. Order for Service

It is now ORDERED that service now be made on Plaintiff's Eighth Amendment claims against Defendants Williams, Brooks, Billingsley, Wooten, Phillips, Saidi, Crawford, Robinson, and Lawrence and that they file an Answer, or other response as appropriate under the Federal Rules and the Prison Litigation Reform Act. Defendants are also reminded of their duty to avoid unnecessary service expenses, and the possible imposition of expenses for failure to waive service.

DUTY TO ADVISE OF ADDRESS CHANGE

During this action, all parties shall keep the Clerk of this Court and all opposing attorneys and/or parties advised of their current address. Failure to promptly advise the Clerk of any change of address may result in the dismissal of a party's pleadings.

DUTY TO PROSECUTE ACTION

Plaintiff must diligently prosecute his Complaint or face the possibility that it will be dismissed under Rule 41(b) of the Federal Rules for failure to prosecute. Defendants are advised that they are expected to diligently defend all allegations made against them and to file timely dispositive motions as hereinafter directed. This matter will be set down for trial when the Court determines that discovery has been completed and that all motions have been disposed of or the time for filing dispositive motions has passed.

FILING & SERVICE OF MOTIONS AND CORRESPONDENCE

It is the responsibility of each party to file original motions, pleadings, and

correspondence with the Clerk of Court. A party need not serve the opposing party by mail if the opposing party is represented by counsel. In such cases, any motions, pleadings, or correspondence shall be served electronically at the time of filing with the Court. If any party is not represented by counsel, however, it is the responsibility of each opposing party to serve copies of all motions, pleadings, and correspondence upon the unrepresented party and to attach to said original motions, pleadings, and correspondence filed with the Clerk of Court a certificate of service indicating who has been served and where (i.e., at what address), when service was made, and how service was accomplished (i.e., by U.S. Mail, by personal service, etc.).

DISCOVERY

Plaintiff shall not commence discovery until an answer or dispositive motion has been filed on behalf of Defendants from whom discovery is sought by Plaintiff. Defendants shall not commence discovery until such time as an answer or dispositive motion has been filed. Once an answer or dispositive motion has been filed, the parties are authorized to seek discovery from one another as provided in the Federal Rules of Civil Procedure. Plaintiff's deposition may be taken at any time during the time period hereinafter set out, provided that prior arrangements are made with his custodian. Plaintiff is hereby advised that failure to submit to a deposition may result in the dismissal of his lawsuit under Fed. R. Civ. P. 37 of the Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that discovery (including depositions and the service of written discovery requests) shall be completed within 90 days of the date of filing of an

answer or dispositive motion by Defendants (whichever comes first) unless an extension is otherwise granted by the Court upon a showing of good cause therefor or a protective order is sought by Defendants and granted by the Court. This 90-day period shall run separately as to each Defendant beginning on the date of filing of each Defendant's answer or dispositive motion (whichever comes first). The scheduling of a trial may be advanced upon notification from the parties that no further discovery is contemplated or that discovery has been completed prior to the deadline.

Discovery materials shall not be filed with the Clerk of Court. No party shall be required to respond to any discovery not directed to him or served upon him by the opposing counsel/party. The undersigned incorporates herein those parts of the Local Rules imposing the following limitations on discovery: except with written permission of the Court first obtained, INTERROGATORIES may not exceed TWENTY-FIVE (25) to each party, REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS under Rule 34 of the Federal Rules of Civil Procedure may not exceed TEN (10) requests to each party, and REQUESTS FOR ADMISSIONS under Rule 36 of the Federal Rules of Civil Procedure may not exceed FIFTEEN (15) requests to each party. No party is required to respond to any request which exceed these limitations.

REQUESTS FOR DISMISSAL AND/OR JUDGMENT

Dismissal of this action or requests for judgment will not be considered by the Court in the absence of a separate motion accompanied by a brief/memorandum of law citing

supporting authorities. Dispositive motions should be filed at the earliest time possible, but no later than one hundred-twenty (120) days from when the discovery period begins.

COMPLIANCE WITH COURT ORDERS AND REQUESTS

Failure to fully and timely comply with any order or request of the Court, or other failure to diligently prosecute this case, may result in the dismissal of a party's pleadings pursuant to Rule 41 of the Federal Rules of Civil Procedure.

SO ORDERED, this 1st day of March, 2017.

s/ Charles H. Weigle
UNITED STATES MAGISTRATE JUDGE